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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 1041

In the Matter of 4145 Broadway Hotel Company, a corporation,

Debtor.

F. GERALD THOMAS and RALPH C. GOLDING,

Petitioners,

vs.

GEORGE W. ROSSETTER, JAY C. McCORD and MAURICE A. ROSENTHAL, Trustees,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

LLOYD C. WHITMAN and
ARTHUR S. FREEMAN,
Counsel for Petitioners.

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October Term, A. D. 1941.

No.

In the Matter of 4145 Broadway Hotel Company, a corporation,

Debtor.

F. GERALD THOMAS and RALPH C. GOLDING,

Petitioners,

vs.

GEORGE W. ROSSETTER, JAY C. McCORD and MAURICE A. ROSENTHAL, Trustees,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Summary and Statement of Matter Involved.

Your petitioners, F. Gerald Thomas and Ralph C. Golding, jointly and severally seek review of an order of the United States Circuit Court of Appeals for the Sev-

enth Circuit, entered February 11, 1941 (R. 191), affirming a decretal order of the District Court for the Northern District of Illinois, Eastern Division, entered August 6, 1940 (R. 159-163).

4145 Broadway Hotel Company is a reorganized debtor Illinois (R. 59, 86) corporation. The plan of reorganization was confirmed March 7, 1935 (R. 2-8), but no final decree has been entered.

Respondents are reorganization directors of the Hotel Company and claim that the trust under reorganization Trust Agreement of May 1, 1935, is still existent and that they are trustees thereunder.

There are 11,683 shares of stock of the reorganized company actually outstanding (R. 67), evidenced by participating certificates issued under the reorganization Trust Agreement of May 1, 1935, and held by approximately 1,300 individuals, including your petitioners (R. 50-58), residents of thirty-eight States, the Philippine Islands, the Canal Zone, Canada, Ireland and Portugal. By June 15, 1940 (R. 148), the beneficial owners of a majority (R. 148-149), some 6,498 shares (R. 62), of the 11,683 shares of stock outstanding had given your petitioner F. Gerald Thomas general powers of attorney-in-fact (R. 62, 45).

The main ultimate issues are whether, May 27, 1940 (R. 52, 54), by votes cast by Thomas under his powers of attorney, a $110,000.00 mortgage loan proposed by respondents, was dissented to by the one-third of the outstanding stock required by the Trust Agreement (Resp'ts' Exh. 3, Art. 3, R. 144; adm't'd. R. 71) to defeat the proposal (Decretal Order, par. F, R. 162); whether as of May 1, 1939, the trust was terminated by a majority vote of stockholders participating in a referendum pursuant to Article 7 (R. 146) of the Trust Agreement (Decretal Order, pars. 4 and E, R. 160, 162); and whether on June

15, 1940, by action of a majority of the stockholders pursuant to Article 6, Sec. 4 and Article 8, Sec. 8 of the Trust Agreement (R. 145, 147), respondents were removed as Trustees (Decretal Order, pars. 12 and G, R. 161, 162).

It is admitted (Mr. Nath, R. 86) that if the Thomas powers of attorney are valid the proposal to place a $110,000.00 mortgage was effectively dissented to and defeated, and that the trust was terminated as of May 1, 1939, and it is unquestioned (Decretal Order, R. 159-163), that on the same premise the Trustees were removed on June 15, 1940. However, as to termination of the Trust as of May 1, 1939, the court finds that even if Thomas' votes were counted the Trust was not terminated (Decretal Order, R. 160, par. 4); but this is mere matter of counting the ballots (Resp'ts' Exhs. 15 and 16, R. 118-140; adm't'd R. 77) and the Court's findings demonstrably mere mistakes of simple arithmetic.

The legality or illegality of Thomas' powers of attorney and his acts thereunder is question of whether, as held by the Circuit Court of Appeals for the Seventh Circuit on prior appeal (In Re 4145 Broadway Hotel Co., Thomas et al. v. Rossetter, et al., 100 Fed. 2nd. 7), an injunction of Thomas restraining him from soliciting or using such powers of attorney (R. 10-11) was a temporary injunction, pending appeal or expiration of time to appeal (midnight June 22, 1938) from an order of May 23, 1938 (See, In Re 4145 Broadway Hotel Co., 100 Fed. 2nd., 7, 8, 2nd. col.), denying Thomas permission to file a proposed so-called second amended petition, or is a permanent injunction, as now held in the instant proceedings by the District Court (R. 162, par. H) and by the same Circuit Court of Appeals (In Re 4145 Broadway Hotel Company, Thomas, et al., v. Rossetter, et al., 117 Fed. 2nd. 639).

Basis of Contention of Jurisdiction to Review.

The judgment of the Circuit Court of Appeals review of which is sought was entered February 11, 1941 (R. 191); and this petition for certiorari is presented on May 10, 1941. This Court has jurisdiction to grant petitioners the writ of certiorari under and pursuant to section 347 (a), Title 28, United States Code, with the same power and authority, and with like effect, as if the cause had been brought to this Court by unrestricted writ of error or appeal.

The Questions Presented.

The ultimate issues are:

(1) Whether, as your petitioners insist, the proposal of respondents to place a $110,000.00 mortgage loan, secured on real estate of the reorganized 4145 Broadway Hotel Company, was defeated by effective dissent thereto, in accordance with the Trust Agreement of May 1, 1935, by at least one-third of the outstanding stock of the Hotel Company.

(2) Whether, as your petitioners insist, the trust created by the Trust Agreement of May 1, 1935, was terminated, pursuant to and in accordance with the terms of the Trust Agreement, as of May 1, 1939, by due action to that end of a majority of the stockholders of the Hotel Company participating in the referendum thereon.

(3) Whether, as your petitioners insist, on June 15, 1940, by action of a majority of the stockholders of the Hotel Company, pursuant to and in accordance with the terms of the Trust Agreement, respondents were removed as trustees under the Trust Agreement of May 1, 1935.

Incidental questions, absolutely controlling of questions above numbered "1" and "3" and actually (assuming

modicum skill in simple arithmetic) controlling of the question above numbered "2", are:

(4) Whether the injunction of May 26, 1938, was a temporary injunction, as your petitioners insist and was held by the Circuit Court of Appeals for the Seventh Circuit on prior appeal (In Re 4145 Broadway Hotel Co., Thomas, et al. vs. Rossetter, et al., 100 Fed. 2nd. 7), or, as your petitioners deny and was denied by the same Circuit Court of Appeals on the first appeal (In Re 4145 Broadway Hotel Co., 100 Fed. 2nd. 7), a permanent injunction, as now held in the instant proceedings by the District Court R. 162, par. H) and by the same Circuit Court of Appeals in the instant case. In Re 4145 Broadway Hotel Company, Thomas, et al., v. Rossetter, et al., 117 Fed. 2nd. 639.

(5) Whether, if at all, which your petitioners severally deny, and if so how far the acts of Thomas under his powers of attorney can be held to be, and be treated as of no force or legal effect (Decretal Order, R. 161, par. 11) as against your petitioner Ralph C. Golding and other certificate holders who were strangers to the injunction of May 26, 1938.

Your petitioners severally further insist:

(6) The finding (Decretal Order, R. 160, par. 4) that if the votes cast by Thomas under powers of attorney are counted, with or without the exceptions specified in the court's findings, the referendum as of May 1, 1939, was in favor of continuance of the trust is without substantial support in the evidence,—on the contrary without any support in the evidence save by distortion of the science of numbers.

(7) The several findings and rulings in the instant case that your petitioner Thomas violated the injunction of May 26, 1938, are contrary to the law and the evidence.

(8) The several findings and rulings of the court that Thomas made misrepresentations to certificate holders and thereby obtained powers of attorney are contrary to law and without substantial support in the evidence and do not, even as alleged and found, amount to actionable false representation; and there is no evidence that any representations made by Thomas were false or were, or under the circumstances lawfully could have been relied or acted upon by certificate holders.

(9) All findings that Thomas made scurrilous or unjustified statements about, or attacks upon respondents are immaterial and, under the evidence, untrue.

(10) The District Court was without power after entry of its orders of March 7, 1935 (R. 2) confirming the plan of reorganization and of May 10, 1935 (R. 8), approving the trust agreement, etc., to regulate, control or deprive certificate holders of their property rights under the Trust Agreement of May 1, 1935, either by enjoining their attorney-in-fact or by attempted visitation on certificate holders generally of penalties for fanciedly offensive or even (as between Thomas and the court or Thomas and the respondents) unlawful acts of Thomas, either by injunction of Thomas, or otherwise.

(11) The District Court improperly retained or attempted to retain an unwarranted jurisdiction for the purpose (reading the record as a whole, but particularly see respondents' petition, R. 11-12, and Decretal Order, R. 159, par. 1) of improperly interfering with collection by State authorities of past due and accruing taxes.

(12) The order of May 23, 1938, denying leave to Thomas to file his proposed second amended petition (Rec. on first appeal, 57, cert'd copy herewith lodged with the Clerk) is a final judgment between the parties hereto, binding as law of the case upon them, that

Thomas' application to file and his proposed second amended petition were not within the scope of the jurisdiction reserved by the District Court; and establishes, as between the parties hereto, that in entering the injunction order of May 26, 1938 (R. 10) the only jurisdiction the District Court had to exercise was that incident to, and growing wholly out of the anticipated appeal by Thomas from the order of May 23, 1938.

Reasons Relied on for Allowance of the Writ.

(1) The instant decision of the Circuit Court of Appeals is in conflict with the decision of the same court on prior appeal in the same matter, and between the same parties, and within the spirit if not the letter of the first clause of Rule 38, 5 (b).

In Re 4145 Broadway Hotel Co., 100 Fed. 2nd. 7.
In Re 4145 Broadway Hotel Co., 117 Fed. 2nd. 639.

(2) By its decision review of which is sought, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Honorable Court's power of supervision.

Sweeney v. *Hanley*, 126 Fed. 97, 101; cert. den. 183 U. S. 700.
Empire State-Idaho Mfg. and Development Co., et al., v. *Hanley*, 136 Fed. 99.
Montfort v. *Korte*, 100 Fed. 2nd (CCA7th) 615, 617; cert. den. 306 U. S. 659.
Camille Inc., v. *D. W. Fitch Co.*, 30 Fed. Supp. 532, 533.

(3) The record herein, the decisions herein of the Circuit Court of Appeals for the 7th Circuit and of the District Court for the Northern District of Illinois, Eastern Division, and decisions in the same general field of other United States Circuit Courts of Appeals and District Courts present such a contrariety of tendencies in practical administration of the Act, both among the Circuit Courts of Appeals and the lower federal courts, as to commend the instant case to the consideration of this Honorable Court.

Case et al., v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106, 109.

(4) So far as we find, this Honorable Court has never determined or established any definite rule as to how long, to what extent, for what purposes and to what ends a Bankruptcy Court may retain jurisdiction after confirmation of the plan of reorganization,—merely to illustrate, whether, as in the instant case, for the apparent purpose (reading the record as a whole, but particularly see respondents' petition, R. 11-12, and Decretal Order, R. 159, par. 1) of interfering with collection by State authorities of past due and accruing taxes, the supposed reserved jurisdiction otherwise actually exercised to the sole end of depriving scattered and unorganized security holders of their property rights under the reorganization Trust Agreement of May 1, 1935, by intimidation and otherwise.

(5) And for your petitioner F. Gerald Thomas, it is a matter of personal liberty.

Case et al., v. Los Angeles Lumber Products Co. Ltd., 308 U. S. 106, 129.

Prayer for Writ.

Wherefore your petitioners severally respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this Court, for its review and determinaion, on a day certain to be therein named, a full and complete transcript of the record and all proceedings of that court in this case, which case was numbered and entitled in that court on its docket number 7497, In the Matter of 4145 Broadway Hotel Company, a corporation, debtor, F. Gerald Thomas and Ralph C. Golding, appellants, vs. George W. Rossetter, Jay C. McCord and Maurice A. Rosenthal, Trustees, appellees; that the said judgment of that court entered February 11, 1941, affirming decretal order of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered August 6, 1940, may be reversed by this Honorable Court, and that your petitioners may severally have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioners will ever pray, etc.

F. Gerald Thomas,
Ralph C. Golding,
Petitioners.

Lloyd C. Whitman,
Arthur S. Freeman,
Counsel for Petitioners.

SUPPORTING BRIEF.

Reported Opinions Delivered in the Courts Below.

The opinion of the Circuit Court of Appeals (R. 186-191) delivered on entry of its judgment of February 11, 1941 (R. 191), reversal of which is sought, is officially reported as *In Re 4145 Broadway Hotel Company*, 117 Fed. 2d. 639. A companion case, between the same parties, decided by the Circuit Court of Appeals, 7th Circuit, October 25, 1938, rehearing denied December 14, 1938, is reported as *In Re 4145 Broadway Hotel Co.*, 100 Fed. 2nd. 7.

Grounds of Invocation of This Court's Jurisdiction.

(1) **The instant decision of the Circuit Court of Appeals is in conflict with the decision of the same court on prior appeal in the same matter, and between the same parties.**

(a) We assume that such conflict is within the spirit though not the letter of the first clause of Rule 38, 5 (b).

(b) On prior appeal (*In Re 4145 Broadway Hotel Co., Thomas et al.* v. *Rossetter et al.*, 100 Fed. 2nd. 7, Justices Evans, Major and Treanor, opinion by the latter), the question was whether the injunction of May 26, 1938, was a permanent injunction and therefore though nominally a consent order, beyond the jurisdiction of the District Court, or a temporary injunction merely to preserve the *status quo* pending possible appeal by Thomas from the order of May 22, 1938, denying him leave to file his pro-

posed second amended petition.* The Court of Appeals held that the injunction of May 26, 1938, was a temporary injunction merely to preserve the *status quo* until disposal of Thomas' contemplated appeal from the order of May 23, 1938, and that therefore the trial court had jurisdiction so temporarily to restrain Thomas, "as a litigant before the court", pending possibility of such appeal by Thomas. *In Re 4145 Broadway Hotel Co.*, 100 Fed. 2nd. 7, 8-9.

(c) In the instant case (Justice Sparks, Major and Lindley, opinion by), the same Circuit Court of Appeals says that the injunction of May 26, 1938 "is again in issue in the case at bar", and holds that "That order still remains in full force and effect" (Op. 640); that the injunction was not limited to matter of Thomas' proposed May, 1938, amended petition, saying (Op. 641, emphasis ours), "We find no such limitation **in the order**". *In Re 4145 Broadway Hotel Co.*, 117 Fed. 2nd. 639, 640, 641.

(d) On the prior appeal whether the injunction was a temporary or a permanent injunction was absolutely controlling of decision. On the second appeal that same question was, and now is head and front of the case: If the injunction of May 26, 1938, was, at first held by the Circuit Court of Appeals, a temporary injunction, it terminated, was dissolved by operation of law (*Kelly* v. *City of Yonkers*, 11 N. Y. S. (2nd) 424, 426; Aff'd. 14 N. Y. S. (2nd) 142; *In Re Greenwald*, 290 N. Y. S. 718, 248 App. Div. 908) at midnight June 22, 1938, by expiration at that time of Thomas' right of appeal from the order of May

* From appellees' brief, page 7, (certified copy of which will be furnished if questioned) we quote, emphasis ours: "* * * what the district judge had in mind, in passing upon appellees' motion for an order of injunction, was solely to restrain appellant from action relating to the pending litigation (not, as appellant now urges, to restrain him forever from exercising the privilege of communicating with other certificate holders)."

23, 1938, denying Thomas leave to file his proposed second amended petition, without Thomas having so appealed; and if the injunction expired at midnight June 22, 1938, Thomas has been guilty of no contempt of court (28 *Am. Jur.* Sec. 330), his powers of attorney are valid, the placing of the proposed $110,000.00 mortgage loan was effectively dissented to by one-third of the outstanding stock at the meeting of May 27, 1940, the trust was terminated as of May 1, 1939, and respondents were removed as trustees as of June 15, 1940.

(2) **By its decision review of which is sought, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the District Court, as to call for an exercise of this Honorable Court's power of supervision.**

(a) Due application of the principles and rules of *res judicata* and estoppel by judgment certainly are "the accepted and usual course of judicial proceedings".

(b) So far as we find, this is the first time in the history of American jurisprudence that a United States Circuit Court of Appeals has refused to follow its own prior final adjudication of identical issues between identical litigants (*McVeigh* v. *McGurren,* 117 Fed. 2nd. 672, 678, CCA., Justices Major, Kerner and Lindley), refusing to recognize that its decision on the first appeal became the law of the case, not open to reconsideration. *Sweeney* v. *Hanley,* 126 Fed. 97, 101; cert. den. 183 U. S. 700. *Empire State-Idaho Mfg. and Development Co., et al.* v. *Hanley,* 136 Fed. 99; *Montfort* v. *Korte,* 100 Fed. 2nd. (CCA 7th) 615, 617; cert. den. 306 U. S. 659. On the first appeal it very properly (*Camille Inc.,* v. *D. W. Fitch Co.,* 30 Fed. Supp. 532, 533; *Sweeney* v. *Hanley,* 126 Fed. 97, 99, 101; cert. den. 183 U. S. 700.) considered the pro-

ceedings in the District Court on hearing of petition for the injunction (Cert'd. Trans. of Rec. CCA Case No. 6696, 62-67; see, also, Proceedings of June 22, 1938, Idem. 68-72). *In Re 4145 Broadway Hotel Co.,* 100 Fed. 2nd. 7, 8-9. On the second appeal it deliberately confines itself to the face of the injunction order. *In Re 4145 Broadway Hotel Co.,* 117 Fed. 2nd. 639, 641, par. No. 1, last sentence.

(3) **So far as we find, this Honorable Court has never determined or established any definite rule as to how long, to what extent, for what purposes and to what ends a Bankruptcy Court may retain jurisdiction after confirmation of the plan of reorganization; and in this and other respects there is such a contrariety of tendencies in practical administration of the Act among the Circuit Courts of Appeals as to commend the instant case to the consideration of this Honorable Court.**

Case et al. v. *Los Angeles Lumber Products Co. Ltd.,* 308 U. S. 106, 109.

In the instant case no final decree has ever been entered; the plan of reorganization was confirmed March 7 1935 (R. 2-8); the Trust Agreement was approved May 1, 1935 (R. 142-147), July 26, 1935, the Receiver's final report was approved, the Receiver's and the Receiver's attorneys' fees fixed and the application for fees to be allowed to other persons continued to September 16, 1935,* and in November, 1935 (Resp'ts' Pet. R. 21, lines 6-16), the further fees were fixed. From November, 1935, to January 18, 1938 (on which latter date your petitioner Thomas first applied for leave to file an intervening petition), no proceedings whatever were had in the Bankruptcy Court.** Since January 18, 1938, the only pro-

* Cert'd. trans. CCA case No. 6696, 25-29.

** Appellees' brief, CCA case No. 6696, p. 23; cert'd. copy to be presented if our statement is questioned by respondents.

ceedings in the Bankruptcy Court have been those involved in Thomas' two appeals to the Circuit Court of Appeals,* excepting only a pending proceeding instituted by respondents April 18, 1941, to attach Thomas for contempt of court for alleged violation in 1939, 1940 and 1941 of the injunction of May 26, 1938, and to restrain Thomas from prosecuting a state-court libel suit in which Thomas complains of respondents circularizing among certificate holders the false statement of respondents that the judges of the Circuit Court of Appeals for the Seventh Circuit, in open court, called Thomas "a cheat and a liar".

Respondents allege in their petition of May 2, 1940 (R. 11-12) that "the principal reason for the non-entry of a final decree has been the tax liability for general taxes, interest and penalties for the years 1927 and thereafter." In the decretal order the District Court calls this "one of the principal reasons for the reservation of jurisdiction" (R. 159), but mentions no others (R. 159-163). In other words, the only reason avowed on this record for failure to enter a final decree and terminate jurisdiction, or claimed jurisdiction to interfere with the property rights of certificate holders under the Trust Agreement of May 1, 1935, was to prevent the State of Illinois from collecting past due and accruing taxes in accordance with the laws of the State of Illinois.

No necessity existed, in law or under the Trust Agreement of May 1, 1935, for respondents to seek the advice or aid of the District Court in putting over the $110,000.00 mortgage loan. Their real purpose was to secure an adjudication by the District Court that Thomas' powers of

* One of CCA cases Nos. 6696 and 6733, consolidated was by petition to the CCA for leave to appeal. In respondents' answer to that petition they said, in part, "The District Court resumed jurisdiction * * * the fact is that after completion of the reorganization in 1935, further jurisdiction of the District Court was revived on motion of F. Gerald Thomas as presented January 18, 1938.

attorney were void,—otherwise they were out. And so it is that since some time in November, 1935, to this writing the reservation of jurisdiction by the District Court has functioned solely to assist respondents in obtaining condonement of their own arbitrary and unjustifiable acts and to frustrate Thomas' efforts to serve the interests of "scattered and unorganized security holders" (*Case et al.* v. *Los Angeles Lumber Products Co. Ltd.*, 308 U. S. 106, 129), scattered through 38 States, the Philippine Islands, the Canal Zone, Canada, Ireland and Portugal.

STATEMENT OF THE CASE.

The basic case 4145 Broadway Hotel Company is a reorganized debtor Illinois (R. 58, 86) corporation. No final decree has ever been entered in the bankruptcy proceedings, but the plan of reorganization was confirmed March 7, 1935 (R. 2-8), and the provided Trust agreement of May 1, 1935 (R. 142-147) and the form of certificates evidencing the interests of beneficial stock holders was approved May 10, 1935 (R. 8).

Respondents—the House of Issue. Respondents Rossetter and McCord and one Sidney H. Kahn (the latter a former officer of S. W. Straus & Co., the House of Issue, R. 78), were S. W. Straus & Company's Bond Holders Committee. Upon reorganization, Rossetter, McCord and one Paul Steinbrecher, since deceased, were appointed trustees (R. 147). Upon Steinbrecher's death, Rossetter and McCord appointed Rosenthal to fill the vacancy (R. 79). Rosenthal is a former employee of S. W. Straus & Co., and today is president of Securities Service Corporation, which, to quote Mr. Rosenthal (R. 78), "was an outgrowth of S. W. Straus & Company," and commonly serves on managing committes and as secretary of bond holders committees, "for

the most part S. W. Straus & Company issues" (R. 78). The three respondents are reorganization directors of the Hotel Company and claim still to be Trustees.

Thomas' powers of attorney There are 11,683 shares of stock of the Hotel Company actually outstanding (R. 67). The beneficial interests in these 11,683 shares of stock are evidenced by participating certificates held by approximately 1300 individuals, including your petitioners (R. 50-58), residents of thirty-eight States, the Philippine Islands, the Canal Zone, Canada, Ireland and Portugal. By June 15, 1940 (R. 148), the beneficial owners of a majority (R. 148-149), some 6,498 shares (R. 62), of the 11,683 shares of stock outstanding had given Thomas general powers of attorney-in-fact (R. 62, 45).

The pleadings June 27, 1940 (R. 17-46), respondents filed a petition for approval of their placing, as reorganization directors, a proposed $110,000.00 mortgage loan, and therein charged (R. 22) that at meeting May 27, 1940, pursuant to Article 3 of the Trust Agreement (Resp'ts' Exh. 3, R. 144; adm't'd R. 71), the dissents of stockholders to the placing of the proposed mortgage loan were less than the one third of the outstanding stock required by the Trust Agreement (Resp'ts' Exh. 3, Art. 3, R. 144; adm't'd. R. 71) to defeat the proposal.

Following order of court (R. 47) "that any registered certificate holder and any party to this proceeding" might answer this petition, your petitioners severally, by separate answers and counter-claims (R. 50-64), (1) denied (Thomas, Par. 9, R. 52-53; Golding, Par. 12, R. 61-62) that the dissents to the placing of the proposed mortgage loan were less than one-third of the outstanding stock; (2) charged (Thomas, Par. 41, R. 51; Golding, Par. 10, R. 60) that the trust under the Trust Agreement of May 1, 1925, had been duly terminated as of May 1, 1939, by

majority vote of the holders of participating certificates participating in referendum pursuant to Article 7 (R. 146) of the Trust Agreement; (3) and charged (Thomas, Par. 5, R. 51; Golding, Par. 18, R. 62) that on June 15, 1940, by action of a majority of the shares outstanding and represented by trust certificates, respondents were removed as Trustees, pursuant to Article 6, Section 4 and Article 8, Section 8 of the Trust Agreement (R. 145, 147).

Respondents filed no replies to the answers and counter-claims of petitioners Thomas and Golding, but the matter was heard as upon issues joined on the charges as well as on the denials of the answers and counter-claims (R. 87), findings thereon were made by the court (R. 50-158), all issues were adjudicated by the decretal order of August 6, 1940 (R. 158-163) adversely to your petitioners and your petitioners duly preserved their objections thereto (R. 163, 165-167).

Decretal order The District Court's decretal order of August 6, 1940 (R. 158-163), reversal of which is your petitioners' desideratum, found and held (1) that the placing of the proposed $110,000.00 mortgage loan had received the required approval of the holders of over two-thirds of the outstanding stock at stockholders' meeting of May 27, 1940 (R. 52, 54); (2) that the trust had not been terminated as of May 1, 1939, by majority vote of the holders of participating certificates participating in the referendum and (3) that respondents were not removed as trustees as of June, 1940, by action, pursuant to the Trust Agreement, of a majority of the shares outstanding and represented by trust certificates.

May 26, 1938 injunction The rulings of the District Court and the affirmance of those rulings by the Circuit Court of Appeals that (our "1" *supra*) the placing of the proposed $110,000.00 mortgage loan was not

dissented to by one-third of the stockholders and (our "3" *supra*) that the Trustees were not removed on June 15, 1940, were both on the ground (Decretal Order R. 161, 162; In Re 4145 Broadway Hotel Company, 100 Fed. 2nd 7, 8-9) that the powers of attorney to Thomas under which Thomas voted and acted in these two matters were void and of no force or effect **because secured and attempted to be used by Thomas in violation of an injunction of May 26, 1938** (R. 10-11).

> "permanently" enjoining and restraining Thomas, his agents, attorneys and employees, "until the further order of this Court," from "mailing or sending any further communications to the holders of participating certificates of 4145 Broadway Hotel Company and from soliciting or accepting any powers of attorney from such holders of participating certificates and from using or attempting to use any powers of attorney heretofore obtained by said F. Gerald Thomas from holders of such participating certificates."

Dissent and removal It is undisputed that if Thomas' powers of attorney were good, the placing of the proposed mortgage loan was dissented to by one-third of the stockholders and the mortgage therefore could not be placed by respondents, and, likewise, that the Trustees were removed on June 15, 1940.

Termination But although respondent's counsel admitted at the hearing (Mr. Nath, attorney for the Trustees, R. 86) that if Thomas' powers of attorney were valid the trust was terminated on the 1939 referendum (our "2", *supra*), nevertheless the District Court found and held (R. 160, 162) that even were the votes cast by Thomas on this referendum counted the trust was not so terminated. On the record herein this finding hardly can be said to raise an issue of fact: It is plainly erroneous and without substantial support in the evidence, demonstration

of its falsity mere matter of simple arithmetic, of counting and adding up the ballots, the base figures conclusively established by the documentary proofs (Trustees' Exhibits 15 and 16, R. 118-131; admitted R. 77). But first, further of the all-important injunction of May 26, 1938.

Further of injunction of May 26, 1938

May 9, 1938, on petition of respondents, the District Court enjoined and restrained Thomas, his agents, attorneys and employees (R. 9), identically as in the order of injunction of May 26, 1938, *supra,* except for the omission of the word "permanently", and ordered Thomas to show cause within ten days why he should not be held in contempt of court for sending out a communication dated April 27, 1938, copy attached to the Trustees' petition (Recitals of the order, R. 10), and set the matter for hearing May 23, 1938.*

On May 23, 1938, the court first denied Thomas permission to file his proposed second amended petition (In Re 4145 Broadway Hotel Co., 100 Fed. 2d., 7, 8, 2nd col.), and then proceeded to hear the contempt charge on the Trustees' petition and Thomas' reply thereto (Recitals of Order, R. 10). The proceedings at this hearing do not pear in the instant record, but are referred to and in part part quoted in the opinion on the first appeal (100 Fed. 2d. 7, 8, 9), and are shown in detail at pages 62 to 67 of the printed record on the first appeal, certified copy of which

* Neither the recited petition of respondents nor the communication referred to in the order of May 5, 1938, appear in the record in the instant case, but are in the record on prior appeal (In Re Broadway Hotel Co., 100 Fed. 2d, 7 CCA case No. 56875) judicial notice of which (Opinion, R. 186, 187) the CCA took on the instant appeal. In our Argument, **post,** in discussing the decision on the prior appeal, we shall have occasion to refer to the record therein for its bearing on the construction of the decision of the same issues between the same parties on that prior appeal. (See, **Camille Inc., v. D. W. Fitch Co.,** 30 Fed. Supp., 532, 533.) Therefore, for the convenience of this Honorable Court, we are herewith lodging with the Clerk a certified copy (more copies not being available) of the CCA printed record on the prior appeal.

(one only procurable) is herewith lodged with the Clerk. From the opinion of the Court of Appeals on the prior appeal, (In Re 4145 Broadway Hotel Company, 100 Fed., 2nd., 7, 8, n. 2), rendered October 25, 1938, it appears that at this hearing on May 23, 1938, the District judge expressly stated that the purpose of the entry of the injunction of May 26, 1938, was to insure that no further communications would be sent out by Thomas or further use made of his powers of attorney **until disposition of anticipated appeal by Thomas from the order of May 23, 1938** denying Thomas leave to file his proposed second amended petition. No appeal was ever taken from that order of May 23, 1938 (In Re 4145 Broadway Hotel Company, 100 Fed. 2nd. 7, 8, 9). **And your petitioner Thomas' right of appeal therefrom expired at midnight June 22, 1938.** (See *Hyman* v. *McLendon,* 102 Fed. 2d, 189, 190; Cert. den. 308 U. S. 563.)

But Thomas did appeal from the order of injunction of May 26, 1938, and on that appeal the instant ~~petitioners~~ Respondents argued and the Circuit Court of Appeals for the Seventh Circuit held that the District Court had jurisdiction to enter the injunction of May 26, 1938, because, as respondents argued and the Circuit Court of Appeals held, that injunction was **merely a temporary injunction to preserve the status quo until the disposal of the contemplated appeal by Thomas from the order of May 23, 1938,** and that the trial court had jurisdiction so temporarily to restrain Thomas, **"as a litigant before the court," pending such appeal by Thomas.** In Re 4145 Broadway Hotel Co., 100 Fed., 2d., 7, 8-9.*

* Elucidative of the decision in In Re 4145 Broadway Hotel Co., 100 Fed. 2nd. 7, we call attention to the District Court's finding in the order of May 23, 1938, that the proposed second amended petition contain allegations in no way relevant to any issue then pending before the court, and that its allegations "are not relevant to the acts and doings of the Trustees over whom [which] the court has retained jurisdiction." (Cert'd Trans., CCA Case No. 6696, p. 57.)

Order of March 20, 1939 On March 20, 1939, after decision, October 25, 1938, of the Court of Appeals on the first appeal, the District Court denied a motion of Thomas to vacate the injunction of May 26, 1938 (Pet. of Resp'ts., R. 23, lines 19-23), urged by Thomas on the sole ground (Resp'ts' CCA Brief herein, p. 4) "that the injunction had fully served its purpose and had therefore become a nullity."

Evidence of contempt and misrepresentation The finding (R. 161, par. No. 9) and decree (R. 162, par. No. I) of contempt are to be differentiated from the finding (R. 161, par. No. 10) and decree (R. 162, par. No. J) that Thomas "obtained powers of attorney through material misrepresentations and omissions of material facts in general communications to the holders of trust certificates"; but the documentary evidence of each is identical. As to the latter this documentary evidence of the representations made is the only evidence, the very words of the finding of misrepresentation (R. 161, par. No. 10) and the identical language of the decree (R. 162, Par. No. J) confining the charge of misrepresentation to "general communications to holders of trust certificates", that is, to Thomas' circular letters.

First of the contempt charge:

There is no color of basis in the record herein for claim that Thomas violated the injunction of May 26, 1938, at any time up to midnight of June 22, 1938, when time to appeal from the order of May 23, 1938, expired.

Respondents' petition does not allege or identify a single act of Thomas as done on or after May 26, 1938, and prior to June 23, 1938, and Thomas' letters attached thereto as exhibits are dated May 8, 1940, or later (Exhs. A, C, E, F, G and N; R. 28, 37, 43, 44, 45, 46).—No act of Thomas found in the court's separate findings (R. 150-

158) or in the decretal order (R. 159-163) is found to have been committed by Thomas prior to June 23, 1938.—Four only of Thomas' powers of attorney are dated between May 26, 1938 and June 22, 1938 (Items 53, 82, 99, 128, Trustees' Exh. 16, R. 133, 134; admitted R. 77); but two of them are dated between June 22, 1938, and October 25, 1938 (on which latter date the Court of Appeals held the injunction to be merely *pendente lite*); and there is no evidence in the record that these powers of attorney were solicited by Thomas on or after May 26, 1938.—The first use by Thomas of any of his powers of attorney was in the spring of 1939 (R. 76) in the referendum to terminate the trust as of May 1, 1939.—No alleged "numerous communications" (Petition, R. 23-24) by Thomas to certificate holders in addition to the exhibits to the Trustees' petition were received or offered in evidence (R. 65-149).—The charge in respondents' petition that Thomas from time to time sent out communications containing scurrilous, vicious, unwarranted and unjustified attacks on the Trustees is merely that he did so "prior to May 8, 1940" (R. 24-25), and no such communications are in evidence except they be the letters of Mr. Thomas copies of which are attached to the respondents' petition as exhibits A, C, E and N, the earliest of which is dated May 8, 1940 (R. 28, 37, 43, 46; the sending admitted by Mr. Thomas in his answer and counter-claim, R. 54), and constituting the only **documentary** evidence in support of any charges that Thomas ever violated the injunction of May 26, 1938, saving only that he voted under his powers of attorney in the April, 1939, referendum and at the 1940 stockholders' meeting (R. 102, 104) in dissent to the placing of the mortgage, and his action of June 15, 1940 (R. 148) for removal of the Trustees.

The testimony, the oral proof relied upon in support of the charges of contempt consists wholly of the testimony of Thomas (R. 94) that he, and he alone, through

his own personal efforts, secured his powers of attorney,—**time when not stated,—not a date mentioned.**

And now of the charge of misrepresentations:

The finding (R. 161, par. No. 10) and decree (R. 162, par. No. J) that Thomas "obtained powers of attorney through material misrepresentations and omissions of material facts **in general communications to the holders of trust certificates**", by the very words of finding (R. 161, par. No. 10) and the identical language of the decree (R. 162, par. No. J), limit the supposed misrepresentations to representations in Thomas' letters to stockholders, exhibits A, C and E attached to respondents' petition (R. 28, 37 and 43). None of these "general communications" contains any statement of fact that could possibly be denominated a false representation, either by express statement or studied omission.—One statement relied upon by respondents as amounting to charge that respondents are dishonest (Exhibit E to Pet., R. 44), is,

> "Let's hold our lines—remove the trustees—install honest efficient management of your own without the perpetuated control of the present management group, wipe out the tax penalties, etc., endeavor to save paying most of the $55,866, terminate the trust, save trustees and depository fees, etc."

The only reference by Mr. Thomas in any of these "general communications" (Exhibit E to Pet., R. 44) to the amount of stock or participating certificates held by him is

> "The statement that 'a few individuals cooperating with him (Thomas) are buying shares of stock of your company as fast as they are offered at distress prices' is a deliberate misstatement. I could have bought had I wished, several hundred shares with the money I have spent in this fight to help the individual shareholders who Mr. Rossetter is quoted as saying are helpless to help themselves."

The Court made findings (Findings, R. 157, pars. c and d), but not in the decretal order (R. 159-163), and there is considerable testimony in the record touching Mr. Thomas' and his friends' and clients' holdings of stock and participating certificates (Witnesses Lillig, R. 88-90, Just, R. 90-91, Milnamow, R. 91; and, called by respondents, Carlus, R. 96, and Thomas as an adverse witness, R. 91-94, 99-101). In view, however, of the limiting terms of the court's finding and decree, we believe that presentation here of that testimony would be unnecessarily to extend this unavoidably lengthy "statement of the case containing all that is material to the consideration of the questions presented" (Rule 27, par. 2, d).

It is matter purely of supposition, **no evidence thereof,** that any holder of participating certificates relied upon, was deceived, mislead or prejudiced by any alleged misrepresentation or fraudulent omission of statement by Mr. Thomas either in any of his general communications to certificate holders or otherwise; and it clearly appears from the record that respondents, the Trustees, were continually in correspondence with all of the certificate holders, their communications largely anticipating and inviting or devoted to denying Thomas' statements in his communications (Exhibits B and D to Pet., R. 29-32, 40-43; Trustees' Petition itself, Rec. 20, par. 7, 21-22, par. 10). And it further appears (R. 74) that certificate holders were well aware where to address the Trustees.

Claimed estoppel and Waiver The trial court found (Findings of Fact, R. 153, Par. 17) that neither Thomas nor any other certificate holder took any action to controvert or dispute the continuance of the trust after being advised by respondents that on the referendum as of May 1, 1939, Thomas' votes by powers of attorney had been disregarded and that the result of the referen-

dum was to continue the trust for a further period of two years, and held (R. 160, par. 7) that thereby and by Thomas' subsequent actions in connection with the vote on placing the proposed mortgage and the attempted removal of the Trustees, Thomas and all holders of trust certificates acquiesced in and were estopped to deny the continued existence of the trust as result of the May 1, 1939, referendum.

The Circuit Court of Appeals does not mention or pass upon this ruling of the District Court (Op. R. 186-191).

Further of the vote for termination of the trust

We present the following, in conclusion of our "statement of the case", fearful to omit anything "material to the consideration of the questions presented" (Rule 27, par. 2, d), though hopeful that respondents will abandon in this Court their contentions below and the lower courts' findings and conclusions that seem to make its presentation imperative.

As above presented, it is undisputed that if Thomas' powers of attorney are good the placing of the proposed $110,000.00 mortgage loan was dissented to by one-third of the stockholders, and the trustees were removed on June 15, 1940; but it is claimed that even if Thomas' powers of attorney were good the trust was not terminated on the 1939 referendum for want of a majority for termination. Demonstration of the falsity of this contention is mere matter of arithmetic,—of counting, adding and subtracting figures conclusively established by the documentary proofs. The documentary proofs are the ballots produced and offered by respondents and received in evidence (R. 77) as trustees' Exhibits 15 and 16, and appearing in the record in the form of agreed statements, viz., "Statement in Lieu of Trustees' Exhibit 15" (R. 118-131) and "Statement in Lieu of Trustees' Exhibit

16" (R. 131-140). The first "Statement" is of the ballots received direct by the trustee for and against continuance of the trust; the second "Statement" is of the ballots received by the trustees from Thomas as attorney in fact for certificate holders.

On first inspection **("police returns," as it were)** of the ballots received direct by the trustees there were 3,186 for continuance (R. 128) and 565 (R. 131) for termination of the trust. Similarly, the 4,640 ballots received by the trustees from Thomas as attorney in fact (R. 140,—the actual addition not, however, shown on the face of the record) were for termination of the trust. A cross-check of the two "Statements" (R. 118-131, 131-140) shows that of the 565 votes received direct by the trustees for termination of the trust, all but 213 (Items 7, 11, 17, 20, 21, 24, 25, 18, 26, 27, 29, 31, 42, 44, 46, 47, 48, 50, 53, 54, 56, 57 and 60, R. 129-130) were duplicated and included in the 4,640 votes by Thomas as attorney in fact for termination of the trust. Adding, therefore, only this 213 to Thomas' 4,640 votes, gives 4,853 votes for termination of the trust as against the 3,186 votes received directly by the trustees in favor of continuance of the trust; **majority for termination 1,667.**

The court found (R. 160) that the result of the referendum would have been in favor of continuance of the trust if all the powers of attorney voted by Thomas were counted, "**except** in those cases **(a)** where the persons signing powers of attorney voted personally in the referendum on the postcard ballots furnished by the trustees to the certificate holders, and **(b)** where the persons signing the powers of attorney were not registered certificate holders".

The court's "(b)" is 35 shares: 5 shares (Item 289, R. 138) voted by Thomas under power of attorney from one William Schmidt who had never registered his cer-

tificate (R. 140), and 30 of the 83 shares (Item 359, R. 140) voted by Thomas as attorney in fact for one Tickton (R. 140); 35 votes therefore deductible from the 4,853 vote by Thomas for termination of the trust, **leaving 4,818 for termination.**

The court's "(a)" is 1,344 shares: 589 shares of Robert and Ruth Sterling (Items 282 and 312, R. 138, 139), 384 shares of 38 other certificate holders and 371 shares of still other 38 certificate holders, all of which were voted by Thomas under power of attorney for termination of the trust; total 1,344, therefore deductible from the 4,818 votes by Thomas, leaving 3,474 for termination.

Deducting thus the court's "(b)", 35 shares, and the court's "(a)", 1,344 shares (total 1,379), from Thomas' 1,667 majority for termination (which is all the court's finding on its face proposes or contemplates, Decretal Order, Par. 4, R. 160), **the majority for termination is 353.**

The situation is not quite as simple as that, but **on no possible tenable theory as to the court's "(a)"** (the 1,344 votes made up of the 589, the 384 votes and the 371 votes) is Thomas' majority for termination of the trust overcome.

The 589 shares of Robert and Ruth Sterling (Items 282 and 312, R. 138, 139) were voted by Thomas for termination under powers of attorney dated May 17, 1938, and March 18, 1939; and these 589 votes are included in the total 4,640 votes cast by Thomas as attorney in fact. But on April 6, 1939, these two shareholders voted these 589 shares direct **for termination of the trust,** and on April 27, 1939, voted the same 589 shares direct **for continuance of the trust** (R. 131). And these 589 shares are not included in the Trustees' count (R. 128) of 3,168 shares voted direct for continuance of the trust, nor in the Trustees' count (R. 131) of 565 shares voted direct for continuance of the trust. Assuming, for purposes of the

argument because most favorable to respondents (not only as to these 589 votes but as to these and the 384 and the 371 votes considered together), that the vote last cast is the effective and controlling vote, add the 589 shares to the votes for continuance of the trust and deduct them from the votes for termination of the trust gives a net gain for continuance of the trust of 1,178 votes.

The 384 shares of the 38 other certificate holders were first voted direct by the certificate holders themselves for continuance of the trust, and are so reported by the Trustees and included in their total of 3,186 (Trustees' Items 3, 20, 31, 39, 41, 49, 58, 62, 71, 72, 100, 115, 124, 166, 173, 182, 187, 192, 202, 206, 213, 214, 217, 223, 225, 226, 228, 235, 236, 255, 262, 275, 283, 296, 305, 307, 315 and 321; R. 119-128). But thereafter, under powers of attorney thereafter given to Mr. Thomas (Thomas' Items 7, 22, 34, 42, 44, 67, 84, 87, 92, 94, 114, 121, 133, 170, 175, 191, 214, 216, 218, 219, 227, 228, 229, 235, 236, 239, 240, 248, 249, 286, 290, 301, 305, 321, 343, 344, 349 and 352; R. 132-139), Mr. Thomas voted this 384 shares for termination of the trust, and the same are included in the Trustees' report of the votes by power of attorney for termination of the trust (said last-mentioned items, R. 132-137).—On the same assumption, most favorable to respondents, the later vote of these 384 shares obtains and must be deducted from the votes reported by the Trustees as for continuance of the trust.

The 371 shares held by 38 certificate holders were voted direct by them, and after the dates of Thomas' powers of attorney from them, for continuance of the trust, and are so counted and reported by the Trustees and included in their total of 3,186 (Trustees' Items 19, 28, 33, 42, 43, 48, 51, 64, 77, 82, 85, 90, 93, 96, 99, 101, 107, 114, 119, 128, 129, 160, 163, 175, 176, 177, 186, 189, 201, 244, 250, 252, 263, 268, 295, 318, 321 and 322; R. 119-128). But there-

after, under the powers of attorney of earlier dates, Mr. Thomas voted the same 371 shares for termination, and these 371 shares are included in the Trustees' count of the total of shares voted by Thomas against continuance (Items 21, 31, 37, 45, 48, 53, 54, 77, 91, 98, 100, 102, 103, 104, 107, 109, 111, 112, 113, 126, 127, 155, 158, 178, 179, 180, 183, 195, 198, 254, 256, 258, 273, 275, 285, 339, 351 and 353; R. 132-139).—While the vote of these 370 shares by Mr. Thomas was the later of the two votes, nevertheless, because the vote by the certificate holders themselves post-dated Thomas' powers of attorney, respondents insist that here the earlier vote by the certificate holders themselves controls. Accordingly, for the purposes of the argument only, we figure that these 371 votes are to be deducted from the total vote, otherwise, for termination of the trust, but no change in the total votes for continuance of the trust was involved since the trustees have already so counted these 371 votes.

The net, then, **on respondents' theory**, of the three items involved in the court's "(a)" (R. 160), that is of the 589, the 384 and the 371 votes, is a gain for continuance of the trust of 1,165 votes. Deducting these 1,165 from Thomas' majority, otherwise, of 1,667, **leaves a majority of 502 for termination of the trust.**

Without presuming to urge application of the suggestion of the Circuit Court of Appeals for the Seventh Circuit (*In re Moulding-Brownell Corp.*, 101 Fed. 2d. 664, 665) that the good faith and sincerity of the lower court may sometimes be matter for consideration by the reviewing court, at least no sanctity attaches to either the trial court's or the Circuit Court of Appeal's arithmetic, and **there is here no open issue of fact, but, contrariwise, indisputable evidence that the trust was terminated as of May 1, 1939, unless the Thomas powers of attorney are illegal.**

Out of abundance of caution, may we point out that certain testimony of respondent Rosenthal (See, R. 74, 81 and Trustees' Exhibits 9 and 10, R. 105) touching receipt of letters of revocation of powers of attorney held by your petitioner Thomas speaks as of May 27, 1940, over a year after the vote to terminate the trust as of May 1, 1939. As appears of record (R. 74), Mr. Thomas received hundreds of powers of attorney after May 1, 1939.

Errors to be Urged.

We urge each and all of the errors alleged in our Petition for Certiorari, title, "The Questions Presented," paragraphs numbered (1)-(12), *supra,* pages 4 to 7, which we here adopt by reference. Argument of some of these errors may be of assistance to the Court; others we shall little more than mention to avoid implication of oversight or abandonment but without burdening this Court with needless elaboration.

Summary.

May 23, 1938, the District Court denied your petitioner Thomas permission to file his proposed second amended petition (See, *In Re 4145 Broadway Hotel Co.,* 100 Fed. 2nd. 7, 8, 2nd. col.), holding (Cert'd. Trans. CCA Case No. 6696, p. 57), that the allegations of the second amended petition were in no way relevant to any issue then pending before the court or "to the acts and doings of the Trustee over whom [which] the court has retained jurisdiction". Proceeding, then, to hearing of the pending petition of respondents for injunction against Thomas, the District Court, as of May 26, 1938, enjoined Thomas "permanently * * * until the further order of the court" from sending out communications to certificate holders

or using powers of attorney from them. From the opinion on the first appeal, which was from this order of injunction (*In Re 4145 Broadway Hotel Co.*, 100 Fed. 2nd. 7, 8 n. 2), and from the proceedings at the May 23, 1938 hearing on respondents' petition for injunction (Cert'd. Trans. CCA Case No. 6696, pp. 62-67), it appears that at the hearing on May 23, 1938, the District judge stated and reiterated that the purpose of the injunction was merely to preserve the *status quo* pending anticipated appeal by Thomas from the May 23, 1938 order refusing Thomas leave to file his proposed second amended petition, and that these reiterated statements and by threat otherwise to attach Thomas for contempt for sending out, prior to entry of any injunction, a letter of April 27, 1938 (Cert'd. Trans. CCA Case No. 6696, p. 5), similar in content to Thomas' proposed second amended petition (Cert'd. Trans. CCA Case No. 6696, p. 3, par. 3, Resp'ts'. Pet. for Injunction), the District judge extorted from Thomas consent to the entry of this injunctional order (R. 10).

Thomas never appealed from the order of May 23, 1938, and his time to appeal expired at midnight, June 22, 1938; but he did appeal from the injunction order of May 26, 1938. On that appeal the Circuit Court of Appeals held that because Thomas had consented to the injunction order the only question before the Court of Appeals was of the jurisdiction of the District Court so to enjoin Thomas, and that the injunction was merely a temporary injunction to preserve the *status quo* until disposal of the contemplated appeal by Thomas from the order of May 23, 1938 and therefore within the jurisdiction of the District Court so temporarily to restrain Thomas "as a litigant before the Court" as applicant for leave to file his proposed amended petition, pending such possible appeal (*In Re 4145 Broadway Hotel Co.*, 100 Fed. 2nd. 7, 8-9).

March 20, 1939, after decision, October 25, 1938, of the Court of Appeals on the first appeal, Thomas moved the District Court to vacate the judgment of May 26, 1938 (Pet. of Resp'ts., R. 23, lines 19-23), on the ground (Resp'ts' CCA Brief on Sec. Appeal, p. 4) "that the injunction had fully served its purpose and had therefore become a nullity", which motion the District Court denied.

June 17, 1940, respondents, representing themselves to be trustees under the Trust Agreement of May 1, 1935, filed a petition for approval of a proposed $110,000.00 mortgage loan to be secured on the property of the reorganized debtor corporation, and for general relief (R. 17-27). By invitation of court (R. 47, order, par. 2), your petitioner Thomas filed an answer and counter-claim (R. 50-56) and your petitioner Golding an answer (R. 58-64) to the petition. Upon trial of the issues presented, the District Court held that Thomas' powers of attorney and all votes and acts of Thomas pretendedly thereunder were null and void because procured and done by Thomas in violation of the injunction of May 26, 1938, which the court held was not a temporary but a permanent injunction in force ever since its entry and now; and, **therefore** (omitting in this Summary some secondary, untenable and insignificant would-be bolsterings of the court's decretal order), held and decreed that (1) the proposal to place the $110,000.00 mortgage loan had not been dissented to by one-third of the outstanding stock of the Hotel Company and thereby defeated, that (2) the trust under the reorganization Trust Agreement of May 1, 1935, had not been terminated as of May 1, 1939, by a majority vote of stockholders participating in prescribed biennial referendum under the Trust Agreement and (3) that respondents had not been removed as trustees on June 15, 1940, by action of a majority of the shares outstanding and represented by trust certificates.

Upon the instant appeal from the District Court's decretal order herein (R. 159-163), the Circuit Court of Appeals for the Seventh Circuit, like the District Court, refused to follow or be bound by its decision on the prior appeal (*In Re 4145 Broadway Hotel Co.*, 100 Fed. 2nd. 7) and now held, contrariwise, that the injunction of May 26, 1938, was a permanent injunction and is and remains in full force and effect; and **therefore** (here too omitting secondary grounds) affirmed the decretal order of the District Court (*In Re 4145 Broadway Hotel Company*, 117 Fed. 2nd. 639).

Your petitioners seek the Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review the second and inconsistent decision of that court herein, to the end of reversing the District Court's decretal order of August 6, 1940,—and, incidentally, of preventing Mr. Thomas being hereafter jailed for contempt of court for acts and doings after midnight June 22, 1938, when, as we insist, the May 26, 1938, order of injunction terminated by operation of law with the expiration, at that time, of all right or possibility of an appeal by Thomas from the order of May 23, 1938.

ARGUMENT.

I.

The injunction of May 26, 1938, was a temporary injunction and terminated by operation of law at midnight June 22, 1938.

(1) In construing the District Court's order and, likewise, in construing the decision of the Court of Appeals upon the first appeal (*In re 4145 Broadway Hotel Company,* 100 Fed. 2nd. 7) resort may properly be had to the records in and before the respective courts.

Camille Inc., v. *D. W. Fitch Co.,* 30 Fed. Supp. 532, 533.

Sweeney v. *Hanley,* 126 Fed. 97, 99, 101; cert. den. 183 U. S. 700.

The question immediately under consideration is not the correctness of the decision of the Court of Appeals on the second appeal but the question of what the Court of Appeals did decide on the first appeal (See, *supra,* pp. 19-20). From the opinion of the Court of Appeals on the first appeal but even more startlingly from the proceedings in the District Court on hearing, May 23, 1938, of respondents' application for injunction (Cert'd. Trans. CCA Case No. 6696, pp. 62-67), which were before the Court of Appeals on the first appeal, he who runs and can read must conclude that the injunction of May 26, 1938, was a temporary injunction.

(2) Furthermore, and also before the Court of Appeals (Cert'd. Trans. CCA Case No. 6696, p. 57), in the very order of May 23, 1938, refusing leave to Thomas

to file a further petition, the trial court found and held, and it is not now open to respondents to question, that Thomas' pending application and proposed second amended petition were not relevant to any jurisdiction reserved by the District Court upon approval of the reorganization plan.

Letulle v. *Schofield,* 308 U. S. 415, 421-422.

In other words, that the court's jurisdiction of Thomas was measured and consisted wholly of its jurisdiction over Thomas as a disappointed applicant for leave to file a petition in the case. The subsequent order of May 26, 1938, must therefore be construed as an exercise by the court of the only jurisdiction it has over Thomas, namely, jurisdiction to restrain Thomas temporarily "as a litigant before the court" pending possible appeal by Thomas from the order of May 23, 1938. *In Re 4145 Broadway Hotel Co.,* 100 Fed. 2nd. 7, 8-9.

(3) The decision of the Court of Appeals that the injunction of May 26, 1938, was a temporary not a permanent injunction became the law of the case and, in spite of the fact that the District Court refused so to recognize, that question was not thereafter open to reconsideration.

Sweeney v. *Hanley,* 126 Fed. 97, 101; cert. den. 183 U. S. 700.

Empire State-Idaho Mfg. and Develpment Co., et al. v. *Hanley,* 136 Fed. 99.

Montfort v. *Korte,* 100 Fed. 2nd (CCA 7th) 615, 617; cert. den. 306 U. S. 659.

(4) The motion of Thomas and the court's order of March 20, 1939 (*supra,* p. 21), denying Thomas' motion to vacate the injunction of May 26, 1938, on the ground "that the injunction had fully served its purpose and

had therefore become a nullity" adjudicated nothing. It must be assumed that the motion was denied because there was then no such injunction in force.

Sweeney v. *Hanley,* 126 Fed. 97, 99; cert. den. 183 U. S. 700.

II.

There is no color of basis in the record for claim that Thomas violated the injunction of May 26, 1938, at any time up to midnight of June 22, 1938, when time to appeal from the order of May 23, 1938, expired.

"First of the contempt charge", *supra,* pp. 21-23.

III.

The injunction of May 26, 1938, being a temporary injunction, designed merely to preserve the status quo pending possible appeal by Thomas from the order of May 23, 1938, it ceased to be operative at midnight June 22, 1938, when time to appeal from the order of May 23, 1938, expired, without Thomas having taken any appeal.

In Re Greenwald, 290 NYS 718, 248 App. Div. 908.

Kelly v. *City of Yonkers,* 11 NYS (2nd) 422, 426; aff'd. 14 NYS (2nd) 142.

Sweeney v. *Hanley,* 126 Fed. 97, 99; cert. den. 183 U. S. 700.

IV.

It follows that Thomas' votes being counted, the proposed mortgage loan was effectively dissented to, the trust created by the Trust Agreement of May 1, 1935, was terminated as of May 1, 1939, and respondents, if there still was any Trust Agreement, were removed on June 15, 1940.

"Statement of the Case", *supra,* pp. 18-19, 21-23.

V.

The District Court was without power after entry of its orders of March 7, 1935 (R. 2), confirming the plan of reorganization and of May 10, 1935 (R. 8), approving the Trust Agreement, etc., to regulate, control or deprive certificate holders of their property rights under the Trust Agreement of May 1, 1935, either by enjoining their attorney-in-fact or by attempted visitation on certificate holders generally of penalties for fanciedly offensive or even (as between Thomas and the court or Thomas and the respondents) unlawful acts of Thomas, either by injunction of Thomas, or otherwise.

(1) As above shown, the District Court's only jurisdiction was touching Thomas' application for leave to file his so-called second amended petition. That jurisdiction gave the District Court no power over your petitioner Ralph C. Golding or other certificate or stockholders other than Thomas.

(2) The injunction order of May 26, 1938, did not enjoin certificate holders from executing powers of attorney.

Lewis v. *Peck,* 154 Fed. 273, 281; cert. den. 207 U. S. 593.

(3) The certificate holder who gave his power of attorney cannot be deprived of his vote at the instance of a third party or by a court which has no jurisdiction of his person merely because of a wrong done him by his attorney-in-fact of which he is not complaining, or because of fancied offense to some court by the attorney-in-fact, in his personal and separate capacity as himself a certificate holder.

State v. *Meredith,* 138 Iowa 783, 167 N. W. 626.
28 *American Jurisprudence,* Sec. 331, citing, *Chase Nat. Bank* v. *Norwalk,* 291 U. S. 431.

(4) The parties entitled to invoke the aid of a court of equity in corporate elections are those whose property rights are involved and affected, the certificate holders themselves not one of whom is here complaining, "not the trustees who have no vested interest in remaining in office or in continuing the trust".

High on Injunctions, 4th Ed., vol. 2, sec. 1233.

VI.

No relief was predicable on the charges of misrepresentation.

"And now of the charge of misrepresentations", *supra,* pp. 23-24.

(1) By finding and decretal order the supposed misrepresentations are limited to what, if any, may be found in Thomas' "general communications", circular letters to holders of trust certificates.

Record 161, par. No. 10.
Record 162, par. No. J.

(2) The findings of the lower courts are assailable if "without substantial support in the evidence" or "plainly erroneous".

Alabama Power Co. v. *Ickes,* 302 U. S. 464, 477.
Virginian Ry. Co. v. *System* Fed. No. 40, 300 U. S. 515, 542.

(3) To say the least, there is no substantial evidence to sustain charges of misrepresentation legally actionable by even Thomas' principals, the certificate holders themselves; and all such findings are "plainly erroneous".

"And now of the charges of misrepresentations", *supra,* pp. 23-24.

(4) Only those who executed the powers of attorney could complain of misrepresentation, and they had easily

accessible sources of information,—which respondents, at least, will not claim were either uninformed or untrustworthy.

Idem, supra, p. 24, 2nd par.

State v. *Meredith,* 138 Iowa 783, 167 N. W. 628.

VII.

The claimed estoppel and waiver (supra pp. 24-25) do not merit discussion.

VIII.

The finding (R. 160) that the result of the referendum as of May 1, 1939, for termination of the trust was against termination even if Thomas' votes were counted is plainly without substantial support in the evidence, erroneous, and mere question of indisputable documentary evidence.

"Further of the vote for termination of the trust", *supra* pp. 25-30.

IX.

Further, and it please the Court.

The District Court first enjoined poor Thomas on May 5, 1938 (R. 9), on the ground that theretofore on April 27, 1938 (Cert'd. Trans. CCA 7th, Case No. 6696, p. 5), broadcast to certificate holders the substance of the petition he was trying to get leave to file. Then on May 26, 1938 (R. 10), he threatened Thomas with attachment for contempt of court for having sent out the letter of April 27, 1938, before any injunctional order had been entered against him. We are not told that there were or that Mr. Thomas used any United States mail boxes "within the vicinity of the court" (*Nye et al.* v. *U. S. et al.,* Case No. 558, October 1940 term, Supreme Court of the United

States.) Having invited, not to say coerced, Thomas to consent to this injunction of May 26, 1938, by, to say the least, (Cert'd. Trans. CCA 7th, Case No. 6696, pp. 62-67) representing and agreeing with Mr. Thomas that the injunction would be merely temporary, for the time of pendency of Thomas' appeal from the order of May 23, 1938, his Honor is found some two years later (Aug. 6, 1940, to be exact, R. 159) coming a complete *volte face* resulting in perpetuation of the respondents in power at the price of disfranchising the great majority of the real parties in interest, the certificate holders. By a similar self-reversal the Circuit Court of Appeals agrees in his Honor's new position. Under the Trust Agreement of May 1, 1935, another prescribed biennial referendum is under way on whether or not to continue the trust for another two years. The House of Issue first got control of the 4145 Broadway Hotel Company, so Mr. Thomas tells us (R. 37; Cert'd. Trans. CCA 7th, Case No. 6696, p. 5), some fourteen years ago, and respondents are now engaged in placing a new mortgage on the involved property which Mr. Thomas believes is well calculated to insure or after sure termination in 1943 of the present vehicle, the recovery of like control by like methods. From the standpoint of public interests wider even than the interests of the scattered certificate holders under the Trust Agreement of May 1, 1935, such is the problem. And, meaning no gratuitous discourtesy to our brother lawyers representing the respondents, we urge the Court to watch for and check respondents' supporting citations to the record herein and, if so be to the record on the first appeal.—And should the lily be painted in respondents' reply and supporting brief in opposition to this petition we respectfully advise the Court that the House of Issue and the bondholders' committee and receiveship racket will be found painted in its true colors in the Securities

and Exchange Commission Report on Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees and the Final Report by the Select Committee to Investigate Bondholders' Reorganizations, authorized by House Resolution 412, 73d. Congress, both available in the Congressional Library.

F. GERALD THOMAS and
RALPH C. GOLDING,
Petitioners.

LLOYD C. WHITMAN,
ARTHUR S. FREEMAN,
Counsel for Petitioners.